BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ABRAHAM VALVERDE	)	
Claimant	)	
VS.	)	
	)	Docket No. 176,225
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant requests review of the Award of Administrative Law Judge Thomas F. Richardson entered in this proceeding on August 31, 1994.

APPEARANCES

Claimant appeared by his attorney, Kelly W. Johnston of Wichita, Kansas. The respondent, a self-insured, appeared by its attorney, David J. Rebein of Dodge City, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge applied the presumption of no work disability found in K.S.A. 1992 Supp. 44-510e and awarded claimant permanent partial disability benefits based upon an eleven and one-half percent (11.5%) functional impairment rating. Claimant requested the Appeals Board to review that finding. Nature and extent of disability is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be modified to award claimant benefits based upon work disability.

Claimant is a non-English speaking, fifty-three (53) year old Mexican male with a third grade education. Over a period of time, while working for respondent in its beef processing operation, claimant developed hand, arm, and shoulder problems that ultimately resulted in bilateral carpal tunnel and ulnar nerve release surgeries. The parties stipulated claimant met with personal injury by accident arising out of and in the course of his employment with respondent during the period of October 1992 through January 10, 1993. In addition, the parties stipulated claimant has sustained an eleven and one-half percent (11.5%) functional impairment to the body as a whole as a result of his injuries. Finally, the parties stipulated to an average weekly wage at the time of accident of $421.32 that is comprised of straight time, overtime, and fringe benefits.

J. Mark Melhorn, the orthopedic surgeon who treated claimant, testified that claimant now has an eleven percent (11%) functional impairment rating to the body as a whole that is comprised of the impairment to both upper extremities and an osteoarthritic condition in the right shoulder. Dr. Melhorn believes claimant should observe the permanent work restrictions of limiting his work to the light-medium category and limiting his repetitive tasks to four (4) hours out of eight (8). Also, claimant is to never lift greater than thirty-five (35) pounds or more than twenty (20) pounds on a frequent basis, and is to avoid repetitive grasping, pushing and pulling, and avoid manipulation, vibratory or power tools, hooks, knives, and scissors.

At his attorney's request, claimant saw orthopedic surgeon Reiff Brown, M.D., who diagnosed overuse syndrome in both shoulders, wrists, and hands. Dr. Brown believes claimant now has a twelve percent (12%) functional impairment to his body as a whole. Dr. Brown also believes claimant should observe permanent work restrictions of no repetitive use of his hands above the shoulders, no work with his upper arms away from his body more than sixty (60) degrees, avoid lifting more than twenty (20) pounds above his shoulders more than occasionally, avoid using hooks and knives, and avoid repetitively flexing and extending his wrists.

Dr. Melhorn operated on claimant's arms in August and September 1993. After both surgeries, claimant immediately returned to work. While claimant recuperated from surgery, respondent accommodated claimant and provided temporary job assignments in which claimant could earn a comparable wage. After claimant had obtained his permanent work restrictions, claimant twice toured respondent's plant to select a job he could perform within his restrictions. After the second tour, claimant selected the job of operating the Japanese machines which entailed feeding intestines into two machines which then separated the fat from the intestine lining.

Claimant began his new job on or about January 13, 1994. Although he had been promised two (2) weeks to learn the job and qualify on the machines, claimant was terminated on his third day on that job assignment.

Respondent contends claimant was terminated from employment because he advised his supervisor, through an interpreter, that he could not perform the job. Claimant denies that allegation and testified that he never told his supervisor that he was unable to perform the job. To the contrary, claimant testified he was called into the office and told he had to qualify on the machine before the end of the day or he would be fired. Unfortunately, neither of claimant's immediate supervisors nor the interpreter who were allegedly involved in these conversations testified in these proceedings. The only evidence respondent presented to rebut claimant's testimony was a document prepared by a general foreman that indicated claimant was terminated because he said he could no longer operate the Japanese machines.

In this instance, the Appeals Board finds claimant's testimony is the more persuasive and, therefore, that claimant was terminated from employment while attempting to qualify in a new permanent job assignment. The Appeals Board also finds claimant was provided temporary accommodated work between the time of his first surgery in August 1993 and the date of his termination.

Because he has sustained a "non-scheduled injury", claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1992 Supp. 44-510e. The statute provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

> ". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of facts shall consider the whole record." K.S.A. 44-501(a).

Because it is more probably true than not claimant was earning a comparable wage between January 10, 1993 and January 16, 1994, during that period claimant is entitled to permanent partial disability benefits based upon his functional impairment rating of

eleven and one-half percent (11.5%). Because respondent removed claimant from accommodated employment and terminated him on or about January 16, 1994, based upon the testimony of the labor market experts the Appeals Board finds the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e is overcome and, therefore, claimant is entitled to permanent partial disability benefits for a work disability of forty-nine percent (49%) as determined below.

The parties presented the testimony of labor market experts James Molski and Marianne Lumpe. Claimant's expert witness, James Molski, testified that based upon the doctors' permanent work restrictions claimant has lost between thirty-five to forty percent (35-40%) and sixty to sixty-five percent (60-65%) of his ability to perform work in the open labor market, but retains the ability to earn $4.75 to $5.25 per hour. Mr. Molski believes claimant has lost the ability to earn comparable wage in the range of thirty-eight to forty-four percent (38-44%) if one did not consider fringe benefits, or forty-five to fifty-two percent (45-52%) if one did consider fringe benefits. Respondent's expert witness, Marianne Lumpe, testified that considering Dr. Melhorn's restrictions, claimant has lost approximately thirty to thirty-one percent (30-31%) of his ability to perform work in the open labor market and has sustained a forty-three percent (43%) loss of ability to earn a comparable wage. In formulating her opinion of lost wage earning ability, Ms. Lumpe did not consider the value of lost fringe benefits.

Based upon the above, the Appeals Board finds claimant has lost the ability to perform work in the open labor market of forty-eight percent (48%), which is the approximate average between the high and low percentages provided by the expert witnesses. The Appeals Board also finds claimant has lost fifty percent (50%) of his ability to earn comparable wages as a result of these work-related injuries. This finding is based upon comparing claimant's stipulated average weekly wage of $421.32 with his ability to now earn $5.25 per hour, or $210.00 per week.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, Rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighed equally. The result is an average between the forty-eight percent (48%) loss of access and the fifty percent (50%) loss of ability to earn a comparable wage resulting in a forty-nine percent (49%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

Claimant concedes receipt of $350.00 in unauthorized medical expense for an unauthorized examination by Dr. Paul Lesko. Accordingly, the Award of $287.50 in unauthorized medical expense for the examination of Dr. Reiff Brown is in error and that portion of the Award should be rescinded.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated August 31, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Abraham Valverde, and against respondent, Excel Corporation, a qualified self-insured, for an accidental injury which occurred on January 10, 1993 and based upon an average weekly wage of $421.32, for 53 weeks of permanent partial disability compensation at the rate of $32.30 per week or $1,711.90 for a 11.5% permanent partial general disability for the period of January 10,

1993 through January 15, 1994, followed by 362 weeks of permanent partial disability compensation at the rate of $137.64 per week or $49,825.68, for a 49% permanent partial general disability, making a total award of $51,537.58.

As of July 21, 1995, there is due and owing claimant 53 weeks of permanent partial disability compensation at the rate of $32.30 per week or $1,711.90, followed by 78.71 weeks of permanent partial disability compensation at the rate of $137.64 per week in the sum of $10,833.64, for a total of $12,545.54 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $38,992.04 is to be paid for 283.29 weeks at the rate of $137.64 per week, until fully paid or further order of the Director.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Claimant may request future medical benefits upon proper application to the Director.

Claimant is entitled unauthorized medical benefits up to the statutory maximum of $350, less amounts previously paid.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent to be directly paid as follows:

Tri State Reporting Preliminary Hearing	$124.20
Tri State Reporting Regular Hearing	$296.70
Underwood & Shane Deposition of Marianne Lumpe	$583.00
Ruth Herman Deposition of Dr. Brown	Unknown
Alexander Reporting Deposition of Dr. Melhorn	$229.04
Alexander Reporting Deposition of James Molski	Unknown
Brent W. Christopher Deposition of Susan Stephens	Unknown

IT IS SO ORDERED.

Dated this ____ day of July, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, Kansas
David J. Rebein, Dodge City, Kansas
Thomas F. Richardson, Administrative Law Judge
David A. Shufelt, Acting Director